No. 13,313

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

APPELLANTS' REPLY BRIEF.

DAVIS & RENFREW,
Box 477, Anchorage, Alaska,
Attorneys for Appellants.

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SUMMARY OF ARGUMENT.

The parol evidence rule is a rule of substantive law and is not waived by failure to object at the time evidence is received. The alleged express warranties were in fact not warranties and the sale of the vessel was made on an as is, where is basis and appellees were not entitled to damages based on alleged oral

warranties where admittedly the agreement of the parties was reduced to writing. To allow damages for breach of alleged oral warranties would charge appellants for a sale agreement they never made.

Discussion as to implied warranties is beside the point in this case. The Court made no findings of fact or conclusions of law as to implied warranties and the judgment is not based thereon.

As a matter of fact the vessel was sold on an as is, where is basis as it appears from all the testimony and the alleged express warranties were not warranties at all. The Court made no findings of fact concerning any reliance of the buyers upon any alleged express warranties and in fact the evidence is clear that appellees did not rely on the alleged oral representations.

In this case there is no evidence that the vessel as purchased by the plaintiffs in its damaged condition was not worth the sum of $25,000 and there is no evidence that the vessel as repaired and improved was not worth the purchase price plus the cost of all of such repairs and improvements. Appellees in fact were not damaged at all. Appellees have here in effect attempted to charge appellants with the cost of completely overhauling and rebuilding the motor and with the cost of a completely refurbished and reconditioned boat instead of a boat in the condition of the alleged warranties. The cost of repairs and improvements is not the proper measure of damages under the circumstances of this case.

Appellees' alleged damages on account of alleged loss of profits are wholly speculative and uncertain and are outside the scope of what appellants might reasonably be assumed to have undertaken in the event they had made any warranties and accordingly such damages as allowed by the Court were improper.

ARGUMENT.

Appellees in their brief divide their argument into six main headings.

In this reply brief appellants will consider first appellees' fourth point concerning parol evidence. If appellants are correct in their contention that such oral evidence should not have been admitted, and is not a proper basis for a judgment against appellants, that decision alone would decide the case.

Appellees in their brief apparently concede that parol evidence to vary or change a written contract is not admissible as a general proposition. However they claim that such rule is not applicable in the instant case for the reasons that, (a) it is contended that the evidence was admitted without objection and that accordingly the evidence admitted must stand, and in the alternative, that, (b) the evidence in question was admissible for the reason that the written agreement was not the complete agreement between the parties and therefore comes within the exception to the parol evidence rule cited by appellees and that, (c) in any event oral evidence of the express warran-

ties was admissible as a basis for showing fraud in the inception of the agreement.

The parol evidence rule is not a mere rule of evidence but is one of positive or substantive law.

20 Amer. Juris., Evidence, Section 1100, page 963, and cases there cited.

Section 1101, Evidence, 20 Amer. Juris. 963, insofar as here material, reads as follows:

> "Where the question arises in the trial court, it is generally held that objection to the admission is not waived merely by reason of the fact that it was not made at the time the evidence was offered. No effect can be given to such evidence provided the trial court is asked in due form to instruct the jury that the previous negotiations were merged in the written contract * * * It has also been held generally that such evidence will be disregarded although no objection is made thereto."

Appellants at the close of plaintiffs' case in the trial court in the subject action moved for dismissal of the action or for judgment on the grounds that plaintiff had failed to make a case and one of the grounds was that no warranties were contained in the written agreement (R. 229).

See also argument of attorney for appellees and discussion of the Court (R. 229-230).

The difficulty here is not that certain alleged oral warranties were or were not made prior to the signing of the written agreement, but the fact that the

agreement did not contemplate any warranties whatsoever. To come in at a later date and claim that the written agreement in fact was not the entire agreement and that the defendant should be liable on alleged express oral warranties not contained in that agreement is an attempt to hold the defendants responsible for a sale which in fact they never made.

There is little or no dispute in this case as to the language used by the parties leading up to the sale in question. Mr. Owens for plaintiffs testified as follows:

> "He, (meaning Anderson), stated that their price for the boat was $25,000 *if we took it as it was there,* or that they would put it in first class condition for $30,000." (R. 74.)

On cross-examination Owens was asked the following question:

> "Q. Well, at first he said, 'I will fix the boat up and you can buy it for $30,000 or if you want it to take it and fix it up, it will be $25,000', isn't that right?"

and answered,

> "A. I think that is correct." (R. 122.)

Unless we are mistaken, the above comprises the whole testimony offered by the appellees concerning the agreement to sell and buy.

From the standpoint of appellants, the evidence concerning the agreement to sell was as follows. Mr. Saindon testified as found on page 240 of the record:

"About the price—the price, too was spoken of, as $25,000 as she sits, as is, and Anderson also said $25,000 as she sits and $30,000 if he fixed it up.

Q. If Anderson fixed it up?

A. Yes."

Appellant Jack C. Anderson, Sr., testifying as to his first conversation with appellee Owens, testified that Owens came aboard the vessel and asked him if it were for sale and what he was asking for the vessel, and testified he replied, $25,000 (R. 297). On a later visit of Mr. Owens to the vessel Mr. Anderson testified that Owens asked him, "What is the best that you will do on the boat?" and that Anderson answered, "The best that I will do on the boat is I will take $25,000 as is, or $30,000 and fix it up in running order." (R. 300). Still later Mr. Owens came again to the boat and according to the testimony Mr. Owens asked if that was the best he (Anderson) would do on the boat and Mr. Anderson answered "Yes". Later in the same conversation Owens asked again if that was the best that Anderson would do on the vessel and Anderson told him yes that the best he would do would be the offer he gave Owens the other day and that thereupon, Anderson informed Owens that he was talking to the people in Vancouver who were interested in the boat as is, where is, and asked Owens what Anderson should tell them and Owens said, "tell them that you have sold the boat" and then Anderson in the presence of Owens informed the other parties that he had sold the boat and Owens

promised that he would have the $5000 down payment in escrow not later than the following Monday (R. 302-303). On page 303 in further testimony of the same witness, it is said, in talking about the conversation with Mr. Owens, "That when I—if he bought the boat, I wanted him to pay $25,000 for the boat. That is what I wanted for the boat, see—take it as is, where is. If he paid $30,000 for the boat, $10,000 down, I would fix the boat in a running condition. So, he said over there at the phone he would take the boat as is for $25,000, $5000 down." (R. 303). Witness Jack C. Anderson, Jr., was asked concerning the agreement made for the purchase of the vessel and stated, "It would be $30,000, $10,000 down and $2000 a month, if we fixed the boat, and then my Dad gave him that alternative, or they take the boat as she was for $25,000, $5000 down and $2000 a month." (R. 368). On cross-examination of this witness appearing at page 381, the question was asked as to whether at that time it was agreed that appellants would make the repairs to the vessel and sell it to appellees for $30,000 and the witness said, "Yes, sir," and then the question was asked if in the alternative Mr. Owens was to make the repairs to the vessel that it would be $25,000 and the answer was, "Yes sir; and he takes her the way she was."

It is significant that appellee A. E. Owens testified in rebuttal in this case but he never at any time repudiated any of the testimony on behalf of appellees concerning these matters. He did say that he didn't recall as to whether or not Saindon was present at

any time when he talked with the appellants and on page 397 of the record on rebuttal and in answer to a leading question of his counsel Mr. Owens did testify that Anderson never told him to take the vessel as is, where is.

From all the evidence, including the evidence of the appellees on direct and cross examination, it seems clear that the language used couldn't be anything else but that the sale was made for $25,000 on the basis that the appellees took the boat as it was where it was. Appellees were to gain the difference if it didn't cost $5000 to make the contemplated repairs and appellees undertook to stand the loss if such contemplated repairs exceeded $5000. Any other conclusion would ignore the plain meaning of the words used.

Williston on Sales, Revised Edition, discusses the question of parol warranties in Section 215, commencing at page 554, and states:

> "There is nowhere a more frequent application of the parol evidence rule than in cases where it is sought to attach a parol warranty to a written sale or contract to sell goods * * * and even where there is no express warranty contained in the writing to which the terms of the sale are reduced, extrinsic evidence of a warranty generally is excluded." Citing cases.

Again, in the last paragraph of page 559, the author uses the following language:

> "The distinction is somewhat fine, and it must be admitted that even under the broad definition of warranty contained in the Sales Act, parol

> evidence of such representations has been rejected. The Courts do not seem to regard the Statute as varying previously existing rules on the matter."

See also the cases cited under note 13 on page 559, particularly the Federal cases.

In reply to the contention that the written agreement does not purport to contain the entire contract between the parties, it appears from the agreement itself that it is a complete and binding contract between the parties.

As to appellees' contention that the oral statements might be used to prove fraud, there is no question but that fraud in the inducement of a contract is a recognized exception to the parol evidence rule. However, that has no application in this case. In the first place the trial Court did not make any findings or conclusions as to fraud and the judgment is not based upon fraud. It is based upon alleged express oral warranties. In the second place, the alleged conversations were not introduced or accepted for the purpose of proving fraud but for the purpose of showing express oral warranties. Plaintiff failed to prove some of the essential elements of a fraud case and in particular failed to prove that the appellants as sellers knew of the falsity of the alleged oral misrepresentations, and failed to prove that Owens was ignorant of the alleged falsity of the so-called representations or that Owens relied or had any right to rely on the so-called representations.

We believe that we have conclusively shown that appellants were not entitled to prove alleged oral misrepresentations and that in fact they bought exactly what they intended to buy and that accordingly, defendants' motion for judgment at close of plaintiffs' case should have been granted.

The first section of appellees' argument is to the effect that there was an implied warranty made by sellers which warranty was breached.

In answer to that argument we believe that it is sufficient to say that there were no findings of fact as to implied warranties, there were no conclusions of law concerning implied warranties, and the judgment as given is not based on implied warranties, but is based specifically upon a claimed breach of certain alleged oral express warranties.

We will consider appellees' arguments numbered two, three and five together.

Three express elements are essential to an express warranty. First the sellers must have made an affirmation of fact or a promise relating to the goods. Second the natural tendency of such affirmation or promise must be such as to induce the buyer to purchase the goods. Third the buyer must have purchased the goods relying on the affirmation of fact or promise made by the seller. The section specifically states that no affirmation of value of the goods nor any statement purporting to be a statement of the seller's opinion shall be construed as a warranty.

Appellee on page 19 of his brief claims that five express warranties were made in this case.

The language used by the parties in their discussion is before the Court. All of the so-called warranties named by the appellees are their conclusions from the language used save the one that the vessel was not leaking.

From the record it is extremely doubtful as to whether appellants ever told the appellees that the vessel struck a log and not a rock. It also seems clear that the appellants never at any time told anyone that the forefoot was slightly bruised. They said that the forefoot was damaged, and so it was. Whether in fact it was damaged by striking a rock or by striking a log is immaterial. As a matter of fact it was damaged. Everybody knew it was damaged. Appellants pointed out the damage to appellee and actually took him and showed him where the splinters were hanging down below the water (R. 363). As a matter of fact while none of the parties knew the extent of the damage to the bow, since the vessel had not been put in dry dock, everybody knew that there was considerable damage there and it was contemplated by all the parties that the boat would be put in dry dock and that a large portion of the $5000 which appellants intended to spend if they had repaired the boat would have been expended in making the repairs to the bow.

It appears that appellants did say on one occasion that the boat was not leaking. As a matter of fact

from all the evidence offered it appears the vessel was not leaking. Even the appellees admit that the boat was not leaking behind the watertight compartment which was immediately back of the chain locker and if in fact the boat was leaking into the chain locker, that leak was due to a condition which was specifically pointed out to appellees and which they elected to repair themselves.

So far as the engine is concerned, it is clear from the evidence that the engine had been running satisfactorily except as to the operation of one cylinder. The damage in connection with that cylinder was specifically pointed out to appellees.

The claim that appellants warranted that expenditure of $5000 would put the vessel in good condition is strictly a conclusion made by appellees from the conversations above related. Upon all the evidence appellants did not make any such statement of fact or promise.

The trial Court in its finding number seven, pertaining to the motor, found that appellants had stated that the vessel was in fair condition (not in good condition as claimed by appellees) with the exception that the crankshaft pin for number five cylinder was scored. The trial Court made no finding that the natural tendency of such statements as were made was to induce the buyers to purchase the vessel nor that the buyers purchased the vessel relying thereon.

Accordingly the findings of fact do not contain findings as to two of the essential elements of express

warranties. There is no basis in the findings of fact for the conclusion of law to the effect that the defendants made express warranties in regard to the condition of the vessel or for the further conclusion that the warranties made by the defendants were such as to induce the plaintiffs to and did induce the plaintiffs to purchase the vessel in reliance thereon, nor for the further conclusion that the plaintiffs purchased the vessel in reliance on the alleged warranties.

As a matter of fact, taking the record as a whole, it is apparent here that nothing that appellants said induced the buyer to buy the vessel. Likewise it is apparent that the buyer did not purchase the goods relying upon the alleged warranties.

It was testified by the witness Oaksmith and never denied by the appellees that Oaksmith had informed appellees prior to the time they purchased the vessel that he had reason to believe that the vessel had a flat crankshaft. This was followed by the testimony of Captain Anderson, Sr., to the effect that appellee A. E. Owens before he purchased the vessel told the witness that he had heard that the vessel had a twisted or bent crankshaft (R. 300). This testimony was not denied by the appellees. Appellant Jack Anderson, Sr., testified that he had certain conversations with A. E. Owens before the vessel was purchased concerning method of removal of the crankshaft if that should be necessary and that such appellee stated that if such a thing should be necessary he believed that

he could get a surplus crankshaft at Juneau. Mr. Owens denied this conversation but a portion of the conversation was apparently overheard by Mr. Saindon, at least that portion having to do with the method of removal of the crankshaft through the stack.

All in all it appears that appellees either knew or believed that it was quite probable that the crankshaft would have to be removed. Certainly they knew that the engine was not new and that it had not been overhauled. Certainly a man with Mr. Owens' experience in connection with boats must have known that it would run into considerable money if he intended to overhaul the entire engine.

Appellees' testimony is vague and uncertain concerning the time when he called the Fairbanks Morse man down to look into the engine, but it appears that Mr. Engstrom, the Fairbanks Morse man, was working on the motor sometime prior to the time Blanchard came down to go to work on the boat and Blanchard estimated the time of his arrival as being anywhere from the 15th to the 20th of April. It is likewise in doubt as to when the first payment was made in connection with the purchase of the vessel but taking April 22, the earliest time suggested, it is apparent that appellee must have been fully informed as to alleged defects in the engine at the time he made the first payment.

As pointed out in the previous brief, appellees bought this boat because they needed it, because the

price was right and because the terms were advantageous. They didn't buy it relying on any alleged warranties.

We call the Court's attention to the recent case of *Hugo v. Loewi v. Smith,* decided by this Court and found at 186 Fed. 2d 858.

See also the following cases:

Murphy v. National Iron Company, Arizona, 227 Pac. 2d 219;

Topeka Mill v. Tripplett, Kansas, 213 Pac. 2d 964;

Dunbar Brothers v. Consolidated Iron & Steel, 23 Fed. 2d 416;

Kull v. Noble, Arkansas, 10 S.W. 2d 902;

Kraig v. Benjamin, Connecticut, 149 Atl. 687;

Dunn v. Vaughn, Oklahoma, 251 Pac. 472.

The Trial Court in this case made a finding that a specific representation was made. We believe that such finding is not binding on this Court. It is not supported by substantial evidence and is against the weight of evidence. It is based on testimony not in dispute or in any event not seriously in dispute.

We call the Court's attention to the discussion of Rule 52 of the Federal Rules of Civil Procedure as found in Barron & Holtzoff, Federal Practice and Procedure, particularly Sections 1133, page 833, Section 1134, page 845 and pocket part page 108, and Section 1135, page 849.

On all the evidence in the case we think that this Court should hold that the Trial Court's finding as

to representations and its conclusions as to warranties was erroneous and that judgment should not have been entered for the appellees and against appellants.

We will now consider appellees' argument No. 6 having to do with damages. This matter has already been argued extensively in our opening brief. However, appellees in their brief (page 33) claim that the Court followed Section 5836-69 of Remington's Revised Statutes of the State of Washington in determining the alleged damages in this case. We disagree. On the face of it there was no evidence from which the Court could have applied that rule. As previously pointed out there was no evidence whatsoever that the vessel would not have operated satisfactorily insofar as the engine was concerned upon the expenditure of $300.00 for returning the number three crankpin. However, be that as it may, it goes without saying that the parties did not contemplate that appellees would completely overhaul and rebuild the engine at the expense of appellants. Appellee Owens claims that the crankshaft was unfit for use and bases his claim on what was told him by Mr. Engstrom, the Fairbanks Morse man. As a matter of fact Mr. Engstrom does not so testify in his deposition. Admitting that the crankshaft was warped, as it was testified by Mr. Engstrom, there is no evidence at all that the warping would have interfered in any way with the operation of the motor. The only possible conclusion here is that appellees desired a rebuilt motor and rebuilt it to their saisfaction.

That was their privilege. They are not entitled to charge such rebuilding against appellants. It is apparent that a completely rebuilt motor with a brand new crankshaft was in a much better condition than called for by the Court's finding that the appellants represented that the motor was in fair condition with the exception of the crankshaft pin for No. five cylinder. The burden was on the plaintiffs to show their alleged damages and having co-mingled items done on the motor in completely rebuilding the motor to their own satisfaction, with items allegedly required to be done to place the motor in a fair condition, they have made proper assessment of damages impossible. Had appellants proved that the boat as sold was reasonbly worth one amount and that the boat as they claim it was warranted was worth some other amount, the difference would be the damage suffered.

There is no evidence at all that the repairs made to the bow exceeded the amount which appellants estimated they would cost. Once again appellees have mingled together items which might properly be charged to fixing the bow as contemplated by the parties with other items not so contemplated and when they got done they had a boat with the bottom completely cleaned and copper painted, new planking here and there and other items which are not specified.

The Trial Court, over objection of appellants, required appellants to testify as to the cost price of the boat to them at surplus sale. In appellees' brief

(page 33) it is argued that the damages charged against appellants were not excessive because the vessel was purchased for $10,000 and extensive damage had been done to it since that time. It is common knowledge that the price of property purchased at an Army Surplus Sale has little relation to its actual value and certainly it had no relation at all to the actual value of the vessel at the time it was sold, approximately one year later.

We believe that it can be fairly deduced from the evidence that the vessel, in the condition in which it was sold to appellees, was reasonably worth $25,000. There is evidence in the record that similar vessels at that time were being offered for sale at Seattle for $35,000. There is undisputed evidence in the record that other parties, who had made a survey, desired to purchase this vessel in its damaged condition for the sum of $25,000 and that such sale was prevented when appellees agreed to buy the vessel and asked appellants to notify the other parties that it had been sold.

There is no evidence at all that the vessel was not worth the purchase price of $25,000 plus the cost of all the repairs and improvements made by appellants upon completion of the repairs and improvements.

It is our contention that in the event plaintiffs were entitled to any damages, which we specifically deny, that the burden was on the plaintiffs to prove their damages and that the plaintiffs have not used the proper measure of damages in putting in their

proof and that the evidence of damages is so vague and uncertain and so co-mingled with other items that no court can properly assess damages on the evidence as it now stands and that the judgment for damages is not based on any substantial evidence.

The allowance made by the Court on account of alleged loss of profits by appellees remains to be considered.

Assuming for the purpose of argument that appellants knew of the work contemplated to be done by the tug for appellees, there is no evidence at all that appellants had any knowledge that appellees had seven million feet of logs or any other quantity of logs to be hauled, or as to the price which appellees were going to get for hauling the logs or as to the profit to be realized in hauling such logs. Neither is there anything in the evidence to indicate that appellants were ever advised that it was desired immediately to take the vessel North to haul logs.

As above set forth there was no showing at all that the vessel would not have hauled the logs satisfactorily had the repairs been limited to those contemplated by the parties.

On all the evidence it seems to us that the alleged damages for loss of profits is so speculative and uncertain that it cannot be said that appellants undertook to pay such damages in making the sale in question. Accordingly, although it is true that loss of profits may be considered as damages in a proper case, this is not such case and the allowance of dam-

ages adjudged by the Trial Court for alleged loss of profits was not justified by the evidence.

Dated, Anchorage, Alaska,
December 8, 1952.

Respectfully submitted,
DAVIS & RENFREW,
By EDWARD V. DAVIS,
Attorneys for Appellants.